Promoting Safety in Criminal Proceedings

CHAPTER 4

In This Chapter...

4.1 Chapter Overview

Criminal cases involving allegations of domestic violence differ from other criminal cases due to the increased risk for re-offense or obstruction of justice during periods when the defendant is not held in custody.* Two reasons for this increased risk are:

- The perpetrator of a domestic violence crime has greater access to the victim than does the perpetrator of stranger violence. Domestic violence perpetrators are likely to live with their victims, or to have regular contact with them for purposes such as child visitation.
- Domestic violence is motivated by the abuser's desire to control the victim. Accordingly, abusers may resort to violence to regain the control that is lost when their behavior leads to criminal charges.

This chapter presents information on statutory provisions and case management practices that address the foregoing risks, with a primary focus on orders for pretrial release and probation. Police reporting requirements and crime victim confidentiality concerns are also discussed. For additional discussion of how abuse might affect an individual's interactions with the court system and attendant safety and policy concerns, see Section 1.6(B) and (C).

*See *Attorney General's Task Force on Family Violence*, p 42-43 (Final Report, 1984); Herrell & Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile & Family Court Journal 32 (1990).

Note: The discussion in this chapter assumes that the defendant is an adult. For a discussion of pretrial release and probation of juvenile offenders, see Miller, Juvenile Justice Benchbook (MJI, 1998). A discussion of crime victim safety generally appears in Miller, Crime Victim Rights Manual (MJI, 2001).

4.2 Police Reports in Cases Involving Domestic Violence

Police who investigate or intervene in "domestic violence incidents" are required by statute to prepare a report describing the incident, which is to be retained in the law enforcement agency's files and filed with the prosecuting attorney within 48 hours after an incident is reported. MCL 764.15c(2)-(3); MSA 28.874(3)(2)-(3). Pursuant to MCL 764.15c(4); MSA 28.874(3)(4), a "domestic violence incident" involves allegations of:

*See Section 6.3 on domestic relationship PPOs.

- A violation of a domestic relationship PPO issued under MCL 600.2950; MSA 27A.2950;* and/or,
- A crime committed by an individual against his or her spouse or former spouse, a person with whom the individual has a child in common, or a person who resides or has resided in the same house hold with the individual.

Under MCL 764.15c(2); MSA 28.874(3)(2), the police domestic violence incident report must contain at least all of the following information:

- The address, date, and time of the incident investigated.
- The victim's name, address, home and work telephone numbers, race, sex, and date of birth.
- The suspect's name, address, home and work telephone numbers, race, sex, date of birth, and descriptive information.
- The existence of an injunction or restraining order against the suspect.
- The name, address, home and work telephone numbers, race, sex, and date of birth of any witness, and the relationship of the witness to the suspect or victim. The witness may be a child of the victim or suspect.
- The name of the person who called the law enforcement agency.
- The relationship of the victim and suspect.
- Whether alcohol or controlled substance use was involved in the incident, and by whom it was used.
- A brief narrative describing the incident and the circumstances leading to it.
- Whether and how many times the suspect physically assaulted the victim and a description of any weapon or object used.
- A description of all injuries sustained by the victim and an explanation of how the injuries were sustained.
- If the victim sought medical attention, information about where and how the victim was transported, whether the victim was admitted to a hospital or clinic for treatment, and the name and telephone number of the attending physician.

- A description of any property damage reported by the victim or evident at the scene.
- A description of any previous domestic violence incidents between the victim and suspect.
- The date and time of the report and the name, badge number, and signature of the reporting officer.

After investigating or intervening in a domestic violence incident, a peace officer must also provide the victim with a written notice. MCL 764.15c(1); MSA 28.874(3)(1). This notice must contain the following information:

- Identity of the peace officer and his or her agency;
- Procedures for the victim to obtain a copy of the police incident report described above;
- Information about domestic violence shelter programs and other resources in the victim's area; and,
- An explanation that the victim's legal rights include the right to file a petition requesting a personal protection order.

4.3 Denial of Interim Bond for Misdemeanor Domestic Assault Defendants

As noted in Section 4.1, domestic violence perpetrators are more likely to coerce or re-assault their victims than are perpetrators of stranger violence. Accordingly, it is important to assess the potential for further violence before the pretrial release of a defendant charged with a domestic violence crime.* To give courts an opportunity to make the necessary safety evaluation, the Legislature has limited the applicability of the interim bond statutes in cases where the defendant has been arrested for misdemeanor domestic assault.

*See Section 4.5 for a discussion of factors indicating a high risk for lethal violence.

The interim bond statutes are found at MCL 780.581; MSA 28.872(1) to MCL 780.588; MSA 28.872(8). They apply generally to defendants arrested with or without a warrant for misdemeanor or ordinance violations punishable by imprisonment for not more than one year and/or a fine. If a magistrate is not available or immediate trial cannot be had, these defendants may be released upon payment of an interim bond to the arresting officer or to the deputy in charge of the county jail. The amount of the bond shall neither exceed the maximum possible fine nor be less than 20% of the minimum possible fine for the offense for which the defendant was arrested. MCL 780.581(1)-(2); MSA 28.872(1)(1)-(2), MCL 750.582; MSA 28.872(2).

The foregoing general provisions for interim bond **do not apply** to defendants arrested **without a warrant** for misdemeanor domestic assault pursuant to MCL 764.15a; MSA 28.874(1), or a city, village, or township ordinance that substantially corresponds to it. MCL 780.582a(a); MSA 28.872(2a)(a).*

*Interim bond is also restricted for persons arrested without a warrant for alleged violation of a PPO. See Section 8.6(C).

Under MCL 780.582a(b); MSA 28.872(2a)(b), interim bond is likewise **unavailable** to a defendant arrested **with a warrant** for violation of MCL

750.81; MSA 28.276 (assault and battery), MCL 750.81a; MSA 28.276(1) (assault and infliction of serious injury), or a substantially corresponding city, village, or township ordinance, if the defendant is:

- A spouse or former spouse of the alleged victim; or,
- A person who resides or has resided in the same household with the alleged victim.

Note: In addition to past or present spouses or cohabitants, MCL 750.81; MSA 28.276 and MCL 750.81a; MSA 28.276(1) punish offenders who have a child in common with the alleged victim. The interim bond restrictions in MCL 780.582a(b); MSA 28.872(2a)(b) are thus inconsistent with the criminal domestic assault statutes in that an interim bond *is* available to a person arrested with a warrant for domestic assault if that person has never had a marriage or cohabitation relationship with the alleged victim, but shares a child in common with the alleged victim. If there are safety concerns in these cases, the judge or magistrate issuing the warrant may endorse a greater amount for an interim bond on the warrant under MCL 780.585; MSA 28.872(5).

The foregoing defendants who are ineligible for interim bond under MCL 780.582a; MSA 28.872(2a) are also ineligible for release on their own recognizance under MCL 750.583a; MSA 28.872(3a).

Domestic assault defendants who are ineligible for interim bond or release on their own recognizance under MCL 780.582a - 780.583a; MSA 28.872(2a) - (3a) must be held until they can be brought before a magistrate for arraignment. However, if a magistrate is not available, or immediate trial cannot be held within 24 hours, the defendant *shall* be held for 20 hours. After 20 hours, the defendant *may* be released on interim bond or on his or her own recognizance. MCL 780.582a; MSA 28.872(2a).

MCL 780.582a; MSA 28.872(2a) does *not* mandate the defendant's release after 20 hours in situations where a magistrate is not available or immediate trial cannot be held. Under MCL 780.581(3); MSA 28.872(1)(3), the defendant may be held beyond the 20-hour period if he or she is:

- Under the influence of intoxicating liquor, a controlled substance, or a combination thereof;
- Wanted by police to answer to another charge;
- Unable to establish or demonstrate his or her identity; or,
- Otherwise unsafe to release.

If one of the foregoing conditions applies, the statute authorizes police to hold the defendant until he or she is in a proper condition to be released, or until the next session of the court.

As of the publication date of this benchbook, Michigan's appellate courts have not yet addressed the question whether MCL 780.582a; MSA 28.872(2a) and MCL 780.581(3); MSA 28.872(1)(3) authorize police to detain arrestees without regard to whether a magistrate is available for immediate

arraignment. However, in civil suits against police agencies and municipalities based on 42 USC 1983, federal courts have described the circumstances in which detention under these Michigan statutes will violate an arrestee's Fourth Amendment rights. In *Brennan v Northville Twp,* 78 F3d 1152 (CA 6, 1996), and *Williams v Van Buren Twp,* 925 F Supp 1231 (ED Mich, 1996), the federal courts noted that the Fourth Amendment requires a prompt determination of probable cause to arrest whenever a suspect is arrested without a warrant. While a judicial probable cause determination within 48 hours of arrest will generally comply with the promptness requirement, a detention for less than 48 hours may still run afoul of the Fourth Amendment if the arrested individual can show that the probable cause determination was delayed unreasonably. The *Brennan* and *Williams* courts deemed the following reasons for delay unreasonable:

- Desire to gather additional evidence to justify the arrest;
- Ill will against the person arrested;
- Delays for delay's sake; and,
- Allowing a domestic situation to "cool down."

Although the foregoing reasons do not justify delays in the probable cause determination, the *Brennan* and *Williams* courts held that delays caused by the unavailability of a magistrate would be reasonable. In *Brennan*, the U.S. Court of Appeals for the Sixth Circuit stated that "there ordinarily should not be a finding of unconstitutionality when a defendant is detained for the legitimate purpose of obtaining an arraignment, if a magistrate is not immediately available." 78 F3d at 1156. The *Williams* court went a step further, stating that "any delay beyond that reasonably necessary to arrange a probable cause determination is unconstitutional." 925 F Supp at 1236. See also *Riverside Co v McLaughlin*, 500 US 44, 56-57 (1991) (any delay longer than 48 hours is presumed unreasonable, and the burden falls on the government to demonstrate that extraordinary circumstances necessitated it; shorter delays may also be unreasonable if unnecessary).

Note: The *Brennan* and *Williams* cases both arose from situations in which the arrest for domestic assault occurred after the court's regular business hours. After-hours arrests are common in domestic violence cases. One study of 435 battered women reported that Saturdays and Sundays were the days of the week on which battering incidents (particularly serious ones) were most likely to occur. The study further reported that the most likely time of day for abusive incidents to occur was from 6 p.m. to 12 midnight.* To promote safety and avoid the difficulties that surfaced in *Brennan* and *Williams*, a court might arrange to have a judicial officer on call to conduct arraignments after court business hours. See MCR 6.104(G), which requires courts with trial jurisdiction over felony cases to adopt plans for judicial availability.

*Walker, The Battered Woman Syndrome, p 25 (Springer, 1984). See also Greenfeld, et al, *Violence by Intimates*, p 11 (Bureau of Justice Statistics, 1998).

4.4 Procedures for Issuing Conditional Release Orders

*Warrantless arrest authority is based on MCL 764.15e; MSA 28.874(5), discussed at Section 4.10.

To enhance safety in a case with allegations of domestic violence, the court can issue its order for conditional pretrial release under **MCL 765.6b; MSA 28.893(2)**, using **SCAO Form MC 240**, which is based on that statute. MCL 765.6b; MSA 28.893(2) permits the court to impose such conditions as are "reasonably necessary for the protection of 1 or more named persons." Release orders issued under this statute can be expeditiously enforced. They are entered into the LEIN system, and law enforcement officers have statutory authority to make a warrantless arrest upon reasonable cause to believe that a violation has occurred.* The following discussion outlines the issuance procedures set forth in the statute, and in MCR 6.106(D), which operates in conjunction with the statute pursuant to MCL 765.6b(6); MSA 28.893(2)(6).

> **Note:** Pretrial release conditions under MCL 765.6b; MSA 28.893(2) can be considered whenever there are allegations of a crime committed against an intimate partner. "Domestic violence crimes" are not limited to domestic assault and stalking offenses. Domestic abuse takes many forms, so that any crime can be a "domestic violence crime" if perpetrated within a pattern of controlling behavior directed against an intimate partner. Moreover, "domestic violence crimes" are not limited to crimes directed against the person of the offender's intimate partner. Abusers may attempt to exercise control by using behavior directed against their partners' property, animals, family members, or associates. For a discussion of the nature of domestic abuse and its various forms, see Sections 1.2 and 1.5. For a list of crimes that can be associated with domestic violence, see Section 3.13.

A. Time to Impose Conditions

Bond conditions may be imposed at the time of the defendant's first appearance in court, or at any time during the pendency of the criminal case. See MCR 6.106(A), (H)(2). The court may apply conditions to all types of bonds, including cash bonds and personal recognizance bonds. MCR 6.106(C)-(E).

*See Section 1.5 and Craft & Findlater, *The Dynamics of Domestic Violence,* 4 Colleague 1, 3 (MJI, Dec, 1991).

Domestic violence is a pattern of behavior perpetrated with the intent to control an intimate partner. An abuser's loss of control may cause an escalation of violence against the victim. Moreover, abusive control tactics may extend to situations within the courtroom. At the defendant's first appearance in court, the judge or magistrate has the opportunity to discourage abusive behavior by letting the defendant and anyone else involved with the case know that coercion and abuse will not influence the outcome of the case.* The court can also remind the defendant that:

- Domestic violence is a serious criminal offense.
- The charges are brought by the People, not by the complaining witness.
- Pretrial release conditions do not include the freedom to harm or intimidate witnesses or others who are directly or indirectly involved with the case.

- Use of coercion or violence to affect witnesses' participation in the case will violate the release conditions.
- Violation of bond conditions will result in warrantless arrest, revocation or forfeiture of bond, and possible further prosecution for obstruction of justice or criminal contempt.*

*See Sections 4.10-4.12 on enforcing bond conditions.

B. Appointing Counsel for Defendant

Because long pretrial delays leave witnesses and others involved with the case vulnerable to coercion and re-victimization, expedited docketing and case processing promote safety in domestic violence cases.* Some courts expedite proceedings by appointing counsel at the first appearance of all defendants charged with domestic violence crimes, regardless of whether they have stated the intent to retain an attorney. This practice may prevent delays caused by a defendant's failure to make timely efforts to retain counsel, and safeguards the defendant's right to counsel. Defendants who so desire can later substitute counsel retained at their own expense in the court's discretion.

*For an illustrative case, see *People v Adams*, 233 Mich App 652 (1999), discussed in Section 1.6(C)(2).

The Michigan Court Rules provide for the court to advise defendants of the right to counsel, and for the appointment of counsel for indigent defendants. MCR 6.005 governs appointment of counsel in felony cases; MCR 6.610(D)(2) applies to misdemeanor cases.

A defendant's right to proceed in propria persona is discussed in *People v Adkins (After Remand)*, 452 Mich 702, 720-727 (1996). *People v Mack,* 190 Mich App 7, 14 (1991) addresses the court's discretion to order substitution of counsel.

Regarding the defendant's payment of attorney fees for appointed counsel, see: MCR 6.005(C) (court may require partially indigent defendant to contribute to attorney fees); *Davis v Oakland Circuit Judge*, 383 Mich 717, 720 (1970) (trial judge has discretion to apply known assets of an alleged indigent defendant toward defraying "in some part" the cost of appointed counsel); *People v Nowicki*, 213 Mich App 383, 388 (1995), (court had authority to order reimbursement for the cost of appointed counsel where the order was not part of the sentence, counsel was appointed irrespective of the defendant's ability to reimburse, and there was no claim that the defendant was not able financially to make the reimbursement); *People v Washburn*, 66 Mich App 622, 624 (1976) (order for repayment of the cost of appointed counsel should not be made prior to conviction). A detailed discussion of the rules governing appointed counsel for indigent defendants is found in Criminal Benchbook Series, Monograph 3, *Misdemeanor Arraignments and Pleas*, Section 3.18 (MJI, 1992). For discussion of a defendant's obligation to pay the costs of court-appointed counsel after acquittal, see Newman, Schulte, and McCann, *Reimbursement or Contribution: An Indigent's Assumption of Counsel Costs,* 24 Criminal Defense Newsletter 1 (State Appellate Defender Office, March/April, 2001), and the three unpublished opinions of the Court of Appeals panel members in *People v Chandler,* No. 206890 (Court of Appeals, September 8, 2000) (vacating a trial court's order that an acquitted

defendant make reimbursement for assigned counsel fees), available at www.courtofappeals.mijud.net (visited August 10, 2001).

C. Required Findings by Judge or District Court Magistrate

MCL 765.6b(1); MSA 28.893(2)(1) requires the judge or district court magistrate to make a finding of the need for protective conditions. This provision further states that the court must inform the defendant of the following *on the record*, either orally, or by a writing personally delivered to the defendant:

- The specific conditions imposed; and,
- The consequences of violating a condition of release. The defendant must be informed *on the record* that upon violation of a release condition, he or she "will be subject to arrest without a warrant and may have his or her bail forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if the defendant is found in contempt of court."*

*On warrantless arrest, see MCL 764.15e; MSA 28.874(5), discussed at Section 4.10.

If the court orders the defendant released on conditions that include money bail, the court must state the reasons for its decision on the record. The court need not make a finding on each of the factors enumerated in the court rule. MCR 6.106(F)(2).* However, the court must make findings on the record in accordance with MCL 765.6(1); MSA 28.893(1), which provides:

*The court rule factors are discussed at Section 4.5.

> "Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive and shall be uniform whether the bail bond is executed by the person for whom bail has been set or by a surety. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:
>
> "(a) The seriousness of the offense charged.
>
> "(b) The protection of the public.
>
> "(c) The previous criminal record and the dangerousness of the person accused.
>
> "(d) The probability or improbability of the person accused appearing at the trial of the cause."

Use of standard bond forms is encouraged to provide defendant with written notice of any conditions. SCAO Form MC 240 is designed for orders issued under MCL 765.6b; MSA 28.893(2). **In cases involving allegations of domestic violence, it is safest to issue pretrial release orders under MCL 765.6b; MSA 28.893(2).** This statute expedites enforcement of release orders by authorizing their entry into the LEIN system, and giving law enforcement officers the authority to make a warrantless arrest upon reasonable cause to believe that a release order has been violated. See MCL 764.15e; MSA 28.874(5), discussed at Section 4.10.

4.5 Factors to Consider in Determining Bond Conditions

MCL 765.6b; MSA 28.893(2) does not specify factors for the court to consider in determining what conditions are "reasonably necessary" to protect a person from further assault by the defendant. However, MCR 6.106(D) states that the court may impose conditions on pretrial release to "ensure the appearance of the defendant," or to "reasonably ensure the safety of the public." MCR 6.106(F)(1) provides that the court should consider "relevant information" in making its release decision. Under MCR 6.106(F)(1), "relevant information" includes:

> "(a) defendant's prior criminal record, including juvenile offenses;*
>
> "(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
>
> "(c) defendant's history of substance abuse or addiction;
>
> "(d) defendant's mental condition, including character and reputation for dangerousness;
>
> "(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;
>
> "(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
>
> "(g) the availability of responsible members of the community who would vouch for or monitor the defendant;
>
> "(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and
>
> "(i) *any other facts bearing on the risk of nonappearance or danger to the public*." [Emphasis added.]

*See Section 3.6(C) for special concerns regarding reporting of prior local ordinance violations.

In a case with allegations of domestic violence, "any other facts bearing on... danger to the public" may include circumstances indicating that the defendant is likely to kill or seriously injure an intimate partner or other person. Assessing the lethality of a situation is difficult, because domestic abuse can be unpredictable. Lethal violence may occur unexpectedly, without any advance warning, or it may be preceded by one or more circumstances that serve as danger signals. In the latter case, researchers have found that certain factors can often reveal a potential for serious violence. These "lethality factors" are noted in the following list. While it is impossible to predict with certainty what a given individual will do, the presence of the following factors can signal the need for extra safety precautions — the more of these factors that are present in a situation, the greater its danger.*

*Walker, et al, *Domestic Violence and the Courtroom... Understanding the Problem, Knowing the Victim*, p 4 (American Judges Foundation, 1995); Walker, The Battered Woman Syndrome, p 38-44 (Springer, 1984); Rygwelski, *Beyond He Said/ She Said,* p 49-52 (Mich Coalition Against Domestic Violence, 1995). See also Section 1.4(B).

- **F** The victim has left the abuser, or the abuser has discovered that the victim is planning to leave.
- **F** The victim (who is familiar with the abuser's patterns of behavior) believes the abuser's threats may be lethal.
- **F** The abuser threatens to kill the victim or other persons.
- **F** The abuser threatens or attempts suicide.

- The abuser fantasizes about homicide or suicide.
- Weapons are present, and/or the abuser has a history of using weapons.
- The abuse involves strangling or biting the victim.
- The abuser has easy access to the victim or the victim's family.
- The couple has a history of prior calls to the police for help.
- The abuser exhibits stalking behavior.
- The abuser is jealous and possessive, or imagines the victim is having affairs with others.
- The abuser is preoccupied or obsessed with the victim.
- The abuser is isolated from others, and the victim is central to the abuser's life.
- The abuser is assaultive during sex.
- The abuser makes threats to the victim's children.
- The abuser threatens to take the victim hostage, or has a history of hostage-taking.
- The severity or frequency of violence has escalated.
- The abuser is depressed or paranoid.
- The abuser or victim has a psychiatric impairment.
- The abuser has experienced recent deaths or losses.
- The abuser was beaten as a child, or witnessed domestic violence as a child.
- The abuser has killed or mutilated a pet, or threatened to do so.
- The abuser has started taking more risks, or is "breaking the rules" for using violence in the relationship (e.g., after years of abuse committed only in the privacy of the home, the abuser suddenly begins to behave abusively in public settings).
- The abuser has a history of assaultive behavior against others.
- The abuser has a history of defying court orders and the judicial system.
- The victim has begun a new relationship.
- The abuser has problems with drug or alcohol use, or assaults the victim while intoxicated or high.

"[A]ny other facts bearing on...danger to the public" may also include the wishes of the defendant's intimate partner. It is not uncommon for the partner of a defendant charged with domestic violence to appear in court at the time of setting bond to request that the charges be dropped, or that the court refrain from issuing a "no contact" order or an order excluding the defendant from premises. Some courts consider such requests in setting conditions of release. Other courts elect not to hear these requests, preferring that they be directed to the prosecutor. The Advisory Committee for this chapter of the benchbook recommends the latter approach. The defendant's intimate partner is not a party to the criminal proceedings against the defendant, and the court can

promote the partner's safety by emphasizing this fact to the defendant. A defendant who realizes that his or her partner cannot control court proceedings may be discouraged from making efforts to manipulate the partner's participation in the case. For more discussion of this subject, see Section 4.9(C).

4.6 Contents of Conditional Release Orders

The court has broad authority to impose conditions of release under MCL 765.6b; MSA 28.893(2) and MCR 6.106. The following discussion summarizes the statutory and court rule provisions governing the contents of conditional release orders, and addresses practical concerns with such orders in cases involving allegations of domestic violence.

A. Statutory and Court Rule Requirements

Under MCL 765.6b(2); MSA 28.893(2)(2), the court's order (or amended order) for conditional release issued must contain:

- Defendant's full name;
- Defendant's height, weight, race, sex, birth date, hair color, eye color, and any other appropriate identifying information;
- A statement of the effective date of the conditions;
- A statement of the order's expiration date; and,
- A statement of the conditions imposed.

The court may also impose a prohibition on the defendant's purchase or possession of a firearm under MCL 765.6b(3); MSA 28.893(2)(3).* If the court imposes such a restriction, and the defendant is known to possess firearms, the court can promote safe enforcement of its order by giving specific instructions for their removal. Such instructions might provide for the police to remove weapons from the defendant's home prior to release, or specify a time and place for the defendant to turn them in.

*See Sections 9.7-9.8 for more discussion of firearms disabilities in domestic violence cases.

In conjunction with MCL 765.6b; MSA 28.893(2), MCR 6.106(D) further gives the court broad authority to impose any conditions or combination of conditions it determines are necessary to "reasonably ensure the appearance of the defendant as required, or...the safety of the public." Under MCR 6.106(D)(1), conditional release orders must provide that "the defendant will appear as required, will not leave the state without permission of the court,* and will not commit any crime while released." Additionally, the court rule contains a lengthy, nonexclusive list of other specific conditions that the court may impose. Under MCR 6.106(D)(2), the court may require the defendant to:

> "(a) make reports to a court agency as are specified by the court or the agency;
>
> "(b) not use alcohol or illicitly use any controlled substance;

*Conditional release orders issued under MCL 765.6b; MSA 28.893(2) are entitled to full faith and credit in other U.S. jurisdictions. 18 USC 2265-2266. See Section 8.13 for more information.

"(c) participate in a substance abuse testing or monitoring program;

"(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;

"(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

"(f) surrender driver's license or passport;

"(g) comply with a specified curfew;

"(h) continue to seek employment;

"(i) continue or begin an educational program;

"(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;

"(k) not possess a firearm or other dangerous weapon;

"(*l*) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;

"(m) satisfy any injunctive order made a condition of release; or

"(n) comply with any other condition, including the requirement of money bail...reasonably necessary to ensure the defendant's appearance as required and the safety of the public."

B. Promoting Pretrial Safety in Cases Involving Allegations of Domestic Violence

The Advisory Committee for this chapter of the benchbook offers the following suggestions for promoting pretrial safety in cases involving allegations of domestic violence.

F Emphasize that the criminal proceeding is between the defendant and the state, not the defendant and his or her intimate partner.

A court can promote the safety of witnesses in criminal cases by emphasizing to the defendant that the state has control over the prosecution of the case. A defendant who realizes that witnesses cannot control court proceedings may be discouraged from making efforts to obstruct justice in the case. Accordingly, the Advisory Committee discourages the practice of asking a complaining witness to approve of or agree to release conditions in cases involving allegations of domestic violence, particularly if this is done in the presence of the defendant. Doing this may endanger the witness, as it sends the message to the defendant that the witness is responsible for the conditions of release rather than the court.

Because witnesses are not parties to a criminal case, MCR 6.106(D) does not authorize the court to impose conditions on them. Accordingly, the court lacks authority to issue mutual "no contact" orders. Moreover, the court lacks authority to order that witnesses participate in counseling sessions, either alone or jointly with the defendant. The court may appropriately provide a witness with information about community service providers, however, as long as it is clear that the use of such services is strictly voluntary.*

*Joint counseling may endanger the victim in a violent relationship. See Section 1.3(B). On other legal and practical difficulties with mutual orders, see Sections 7.4(E) and 8.13(B)(2).

F Consider issuing a "no contact" order that clearly prohibits *all* contact with persons who may be in danger of re-victimization.

Domestic violence crimes are potentially more dangerous than crimes involving strangers due to the defendant's easy access to and influence over persons who may serve as witnesses at trial. By limiting the defendant's access to these persons, "no contact" orders decrease the risk of coercion or re-assault. If the defendant and a complaining witness live together, a "no contact" order that excludes the defendant from the shared premises can also expedite case processing by encouraging resolution of the case and discouraging efforts to delay the proceedings. If the defendant and a complaining witness have children in common, the court can promote safe enforcement of its order by taking existing court orders regarding custody and parenting time into consideration. For more information on such orders, see Chapters 12 - 13.

Some courts consider the wishes of the complaining witness as a relevant factor in determining whether to issue a "no contact" order.* Other courts elect not to hear from complaining witnesses in setting bond conditions, and refer witness concerns to the prosecutor. The Advisory Committee for this chapter of the benchbook recommends the latter approach. The complaining witness is not a party to the criminal proceedings against the defendant, and the court can promote safety by emphasizing this fact to the defendant. A defendant who realizes that witnesses cannot control court proceedings may be discouraged from making efforts to obstruct justice in the case.

*See Section 4.9(C) for more discussion of witness concerns with pretrial release orders.

Effective "no contact" orders prohibit the defendant from making any contact with witnesses in person, by mail, by phone, or through a third party. It may be helpful to remind the defendant and the complaining witness that *any* contact between them is a violation of a "no contact" order, even if the complaining witness consents; the release conditions are strictly a matter between the defendant and the court.

F If a "no contact" order is issued, it is preferable to remove the defendant from premises shared with a complaining witness.

If the defendant's residence with a complaining witness to the alleged crime poses a safety threat, it is preferable to remove the defendant from the shared premises and allow the witness and any children to remain. This practice clearly communicates the state's intent to protect victims of domestic violence. Moreover, requiring a complaining witness to vacate the shared premises may reward the defendant for a crime and discourage others from turning to the court for protection.* If the court excludes a defendant from premises shared with a witness, it can forestall some enforcement problems by including a provision in its order that specifies a date and time for removal of the defendant's property. The court might also provide for property removal under police supervision.

**F Inquire into the safety of children in the home.*

Attorney General's Task Force on Family Violence, p 43 (Final Report, 1984).

The National Crime Victimization Survey reports that between 1993 and 1998, children under age 12 lived in 43% of households where domestic violence occurred. A majority of these children are aware of the violence around them.* Children are often exploited by abusers as a tactic for

*Rennison & Welchans, *Intimate Partner Violence,* p 6 (Bureau of Justice Statistics, May, 2000); Hart, *Children of Domestic Violence,* Child Prot Svcs Q (Pittsburgh Bar Ass'n, Winter, 1992).

maintaining control in the adult relationship; moreover, they are at risk of physical injury from domestic violence. Accordingly, conditional release orders in cases involving domestic violence will not effectively promote safety unless the court considers the needs of the defendant's or witnesses' children.

F Inquire whether the defendant is subject to a personal protection order or a prior domestic relations order.

Conflicting court orders cause confusion for the parties subject to them and for police officers who may be called upon for enforcement. This confusion offers domestic violence perpetrators the opportunity to abuse without being held accountable. It may also prevent police from adequately assessing the danger that is present at the scene of a domestic violence call. A court issuing a conditional release order can prevent confusion by inquiring whether another court has previously issued a personal protection order restraining the defendant's contacts with a witness in the criminal case. If the defendant is subject to a PPO, the criminal court can craft its release order to contain consistent provisions. If the criminal court deems it necessary to impose release conditions that are inconsistent with the PPO provisions, it can prevent confusion by communicating with the court that issued the PPO.

Similar concerns arise in cases where a defendant's interactions with a witness in a criminal case are subject to conditions imposed in a prior domestic relations order. As is the case with PPOs, a criminal court issuing a conditional release order can prevent confusion by inquiring into the existence of a prior domestic relations order, and, if possible, crafting a release order with consistent provisions. If this cannot be safely done, however, the Advisory Committee for this chapter of the benchbook recommends that the criminal court issue whatever conditions it deems necessary to promote safety in the case, and inform the domestic relations court that it has done so. MCR 3.205 contains notice requirements that may apply in cases where a conditional release order affects a defendant's access to minor children who are subject to a prior domestic relations order. Although no Michigan statute or court rule addresses the precedence of court orders issued in concurrent criminal and domestic relations proceedings, the Advisory Committee for this chapter of the benchbook suggests that orders issued in criminal cases should be followed by courts in domestic relations cases, because criminal orders address serious public safety concerns that are not at issue in domestic relations cases.

F Remember that failure to support one's family members is a criminal offense.

Domestic abusers often exert control over their intimate partners by manipulating the couple's finances.* For example, an abuser may maintain a partner's dependence by limiting the partner's access to money. It is thus not uncommon that an abuser who has been excluded from premises will assert control by refusing to make mortgage, utility, or other payments necessary to support a partner and children who remain on the premises.

*See Section 1.5 for a discussion of abusive tactics.

Although questions of family support are typically addressed in domestic relations proceedings in family court, financial abuse is a criminal offense that can be as harmful as physical assault. See Section 3.13(B)(4) for a list of crimes involving desertion and non-support. The Advisory Committee for this chapter of the benchbook notes that MCR 6.106(D)(1) authorizes the court to order that the defendant "will not commit any crime while released." If the court feels that family support may be problematic with a particular defendant, it can discourage financial abuse by informing him or her that it will regard failure to provide family support as a criminal action in violation of the release conditions.

F To protect the defendant's right against self-incrimination, do not order *pretrial* participation in a batterer intervention service.

Under MCR 6.106(D)(2)(d), the court may require the defendant to "participate in a specified treatment program for any physical or mental condition, including substance abuse." Although batterer intervention services might be characterized as "treatment programs" for a "mental condition," they are inappropriate pretrial treatment options insofar as they require participants to admit responsibility for their violent acts. Prior to conviction, court-ordered participation in such a program would arguably violate a criminal defendant's constitutionally guaranteed right against self-incrimination.

Batterer intervention programs should be distinguished from other types of "treatment programs" that promote safety without requiring participants to make incriminating admissions. A mental health assessment may be a necessary precaution in cases where the defendant is potentially suicidal or homicidal. The court may also order treatment for drug or alcohol use, which tends to increase the severity of domestic violence. A release condition that addresses a mental illness (such as psychosis) is likewise justifiable on safety grounds, for such illnesses impede the ability to control violent behavior.*

*See Section 1.3(B)-(C) for a discussion of how drug or alcohol use and mental illness interrelate with domestic abuse.

Batterer intervention services should also be distinguished from the pretrial informational programs that some courts have instituted for defendants in cases where domestic violence is alleged.* These programs explain court proceedings and provide general information about domestic violence without requiring participants to accept responsibility for specific behavior.

*See Sections 2.3-2.4 on batterer intervention services.

F Require the defendant to post a cash bond.

A defendant released on personal recognizance will have little incentive to refrain from abusive behavior. Requiring the defendant to post a cash bond pursuant to MCR 6.106(E) will more likely ensure the defendant's appearance and the safety of witnesses. This requirement will also convey the message that the court regards the charged offense as a serious matter.

MCL 765.6a; MSA 28.893(1) provides that before granting an application for bail, "a court shall require a cash bond or a surety other than the applicant if the applicant (1) Is charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him; or (2) Has been twice convicted of a felony within the preceding 5 years."

F Use pretrial services to monitor bond conditions.

In some courts, the office of pretrial services monitors defendants' compliance with bond conditions. Pretrial supervision may consist of drug and alcohol testing or "tether" programs. Some offices of pretrial services also assist the court by assessing the defendant's lethality or providing pretrial domestic violence education programs for defendants.

F Consider the need to preserve the confidentiality of witnesses' identifying information.

In cases where a witness is in hiding from the defendant, the court can promote safety by restricting the defendant's access to information that would identify the witness's whereabouts. In felony cases, the Crime Victim's Rights Act provides as follows:

> "(1) Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera." MCL 780.758(1); MSA 28.1287(758)(1).

Provisions substantially similar to MCL 780.758(1); MSA 28.1287(758)(1) apply in cases involving serious misdemeanors* and offenses by juveniles. See MCL 780.818; MSA 28.1287(818) (serious misdemeanors) and MCL 780.788; MSA 28.1287(788) (juvenile offenders).

*Serious misdemeanors include stalking, assault and battery, aggravated assault, and illegal entry. MCL 780.811(a); MSA 28.1287(811)(a).

"Other personal identification" that may place a victim in danger includes:

- A child's residence address.
- A victim's job training address.
- A victim's occupation.
- Facts about a victim's receipt of public assistance.
- A child's day-care or school address.
- Addresses for a child's health care providers.
- Telephone numbers for the above entities.
- Name change information. See Section 4.16(C).

For more about criminal court records, see Section 4.16. See Sections 10.4-10.5 and 11.4 on confidentiality of records in domestic relations actions, and Section 7.4(C) on confidentiality in PPO actions. On victim privacy concerns in criminal cases generally, see Miller, Crime Victim Rights Manual, ch 5 (MJI, 2001).

4.7 LEIN Entry of Conditional Release Orders

Upon issuance of a release order (or a modified release order) under MCL 765.6b; MSA 28.893(2), the judge or district court magistrate must immediately direct a law enforcement agency within the court's jurisdiction to enter the order into the LEIN system. This notice to the law enforcement agency must be in writing. MCL 765.6b(4); MSA 28.893(2)(4). SCAO Form MC 240 can be used for this purpose.

*See Section 4.9 on modifying conditional release orders.

> **Note:** Although MCL 765.6b; MSA 28.893(2) does not require it, some courts give a certified copy of pretrial release orders to the individuals for whom protective conditions have been issued. This practice does not fulfill the court's statutory responsibility to have release orders with protective conditions entered into LEIN, but it can inform protected individuals of the release conditions, and allow them to show the order to police officers in the event of a violation. While it may promote safety, this practice carries a potential risk for confusion if the order is later amended or rescinded.

4.8 Duration of Conditional Release Orders

Under MCL 765.6b(2); MSA 28.893(2)(2), the court's conditional release order (or amended order) must contain a statement of the order's expiration date. The duration of the release order is within the court's discretion, and court practices differ in this regard. For example, some courts issue orders of six months' duration in misdemeanor cases, and one year's duration in felony cases. Other courts specify a one-year duration for release orders in all cases. The order should at least be of sufficient duration to cover the time needed to complete proceedings in the issuing court. In felony cases, six months is usually sufficient time to complete preliminary examination and bind-over proceedings in district court. In specifying an expiration date, it is important to note that release conditions expire at 12:01 a.m. on the date specified in the order.*

*SCAO Form MC 240a can be used to extend the expiration date of a bond.

Unless it is modified, rescinded, or expired, the district court's conditional release order in a felony case continues in effect after the defendant has been bound over to circuit court. See MCL 780.66(3); MSA 28.872(56)(3). To expedite enforcement, however, the Advisory Committee for this chapter of the benchbook suggests that circuit courts take steps to update the information in the LEIN system after bind-over, so that law enforcement agencies will have no questions about the status of the case in the event that the defendant violates a release condition. The circuit court can continue or modify the district court's release order at arraignment, making it an order of the circuit court. If the only amendment the circuit court wishes to make is to extend the bond's expiration date, the court can complete SCAO Form MC 240a. If the conditions of bond release are to be amended in addition to, or instead of, the expiration date, the court should use SCAO Form MC 240. In any event, the court should contact the responsible law enforcement agency to enter the order into the LEIN system. After the circuit court's release order is entered

into LEIN, SCAO Form MC 239 can be used to remove the district court's order from the system.

If an order issued under MCL 765.6b; MSA 28.893(2) ceases in effect due to rescission or closure of the case, the judge or district court magistrate shall immediately order the law enforcement agency to remove the ineffective order from the LEIN system. MCL 765.6b(4); MSA 28.893(2)(4). SCAO Form MC 239 is appropriate to use where the case is closed. By checking box number 5, SCAO Form MC 240 can be used when the order is revoked.

After a defendant's conviction, the court may incorporate the pretrial release conditions into orders of probation. MCL 771.3(2)(o); MSA 28.1133(2)(o) authorizes the issuance of probation orders with "conditions reasonably necessary for the protection of 1 or more named persons." Probation orders containing such conditions are entered into the LEIN system. MCL 771.3(5); MSA 28.1133(5). Violation of a probation order subjects the offender to warrantless arrest under MCL 764.15(1)(g); MSA 28.874(1)(g). Some courts give a copy of the probation order to the protected individual to show to police officers in the event of a violation. See Sections 4.14 - 4.15 for more on probation.

4.9 Modification of Conditional Release Orders

Because of the complexity and potential danger in criminal cases involving allegations of domestic violence, modification of conditional release orders should only be granted on the basis of objectively valid reasons. This section addresses requests for modification of release orders containing conditions for the protection of a named individual brought by the prosecutor, the defendant, and the protected individual. The discussion distinguishes statutory and court rule procedures in felony and misdemeanor cases.

A. Modification of Release Orders in Felony Cases

In felony cases, a party seeking modification of a release order should generally proceed under MCR 6.106(H)(2).* Modification of release decisions under this court rule may be initiated by the prosecutor or defendant, or by the court on its own motion. The party seeking modification has the burden of going forward. MCR 6.106(H)(2)(c). In modifying a release decision, the court should apply one of the following standards, depending on when the modification is requested:

- **Prior to arraignment on the information in circuit court**, any court before which proceedings against the defendant are pending (i.e., the district court) may modify a prior release decision, based on a finding that there is "a substantial reason for doing so." MCR 6.106(H)(2)(a).
- **At and after the defendant's arraignment on the information in circuit court**, the court with jurisdiction over the defendant (i.e., the

*This court rule does not specify that it applies only to felonies. However, this may be inferred from the rule's reference to the "arraignment on the information," which would not occur in misdemeanor cases.

circuit court) may make a de novo determination and modify a prior release decision. MCR 6.106(H)(2)(b).

Other provisions governing modification of release orders in felony cases are as follows:

- The court must of necessity initiate modification of a bond where release is required under MCR 6.004(C). This rule requires pretrial release on personal recognizance in felony cases where the defendant has been incarcerated for a period of six months or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode.
- Under the Crime Victims' Rights Act, the prosecuting attorney may move that the bond of a felony defendant be revoked based upon "any credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family..." MCL 780.755(2); MSA 28.1287(755)(2). A substantially similar provision applies in cases involving juvenile offenders. MCL 780.785(2); MSA 28.1287(785)(2).

B. Modification of Release Orders in Misdemeanor Cases

In misdemeanor cases, either the prosecutor or defendant may seek modification of a release order in the court before which the proceeding is pending. MCL 780.65(1); MSA 28.872(55)(1). Unlike MCR 6.106(H)(2) governing felonies, this statute gives the court no authority to initiate modification on its own motion. The defendant shall give the state reasonable notice of his or her request to modify the release conditions. MCL 780.65(2); MSA 28.872(55)(2). If the state seeks modification, it shall give the defendant reasonable notice, except in cases where there has been a breach or threatened breach of any release conditions:

> "Upon verified application by the state or local unit of government stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing the court may enter an order [increasing or reducing the amount of bail or altering the conditions of the bail bond]." MCL 780.65(4); MSA 28.872(55)(4).*

*For release orders issued under MCL 765.6b; MSA 28.893(2), the defendant is subject to warrantless arrest upon probable cause to believe that he or she has violated the order. See Section 4.10.

Other provisions governing modification of release orders in misdemeanor cases are as follows:

- The court must of necessity initiate modification of a bond where release is required under MCR 6.004(C). This rule requires pretrial release on personal recognizance in misdemeanor cases where the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode.

- In cases involving serious misdemeanors under the Crime Victims' Rights Act, the prosecuting attorney may move that a defendant's bond be revoked based upon "any credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family." MCL 780.813a; MSA 28.1287(813a).* See also MCL 780.815(2); MSA 28.1287(815)(2). Serious misdemeanors are defined in MCL 780.811(a); MSA 28.1287(811)(a) to include stalking, assault and battery (including domestic assault), aggravated assault (including aggravated domestic assault), illegal entry, and discharging a firearm aimed intentionally at a person.

*A substantially similar provision applies in cases involving juvenile offenders. MCL 780.785(2); MSA 28.1287(785)(2).

C. Requests for Modification by the Protected Individual

Sometimes the individual protected by a conditional release order appears in court to request modification of the order. Common requests are that the court lift its "no contact" order, or allow the defendant to return to premises shared with the protected individual. The protected individual may also request that charges be dropped. These requests may be motivated by various factors not known to the court, such as:*

*See Section 1.6(B)-(C) on abused individuals' survival strategies and participation in court proceedings.

- Coercion by the defendant.
- A cyclical pattern of abuse and reconciliation in the relationship — the protected individual may seek modification during a period of reconciliation.
- Emotional attachment to the defendant.
- Belief that the abuse will stop.
- Ambivalence about jailing or otherwise removing the defendant from the home where the defendant is the sole source of support for the family.
- Shame about the criminal proceedings, or fear of public exposure.
- Fear of the practical consequences of a criminal conviction (e.g., loss of federally-subsidized housing).
- Distrust of the legal process due to lack of information, or prior bad experiences.

Some courts consider the wishes of the protected individual in deciding whether to modify conditions of release. Other courts elect not to hear from this person, referring any concerns with bond conditions to the prosecutor. The Advisory Committee for this chapter of the benchbook discourages ex parte responses to any requests for modification, and recommends the latter approach. The protected individual is not a party to the criminal proceedings against the defendant, and the court can promote safety by emphasizing this fact to the defendant. A defendant who realizes that the protected individual cannot control court proceedings may be discouraged from re-offending or making efforts to obstruct justice in the case.

The Advisory Committee makes the following further observations about common scenarios that arise incident to requests for modification:

- The protected individual's appearance in court with the defendant after issuance of a "no contact" order is itself a violation of that order, for which the defendant is subject to sanction. Such appearances may indicate that the defendant has used coercion to manipulate the protected individual's participation in the case.
- Appearances by one attorney who purports to act on behalf of both the defendant and the protected individual may indicate coercion by the defendant, and are likely to involve a conflict of interest on the part of the attorney. See MRPC 1.7.
- If it modifies its release order, the court can promote safety by advising the defendant and the protected individual that any deleted conditions can be reinstated if the court deems it necessary. If the court decides to drop a "no contact" provision, it might consider retaining a prohibition on assaultive behavior.

D. LEIN Entry of Modified Release Order; Notice to Surety

If a release order issued under MCL 765.6b; MSA 28.893(2) is modified, the judge or district court magistrate must immediately direct a law enforcement agency within the court's jurisdiction to enter the modified order into the LEIN system. This notice to the law enforcement agency must be in writing. MCL 765.6b(4); MSA 28.893(2)(4). SCAO Form MC 240 can be used to notify the law enforcement agency. If a release order is modified using Form MC 240, it should be clearly marked as "modified" or "amended" to avoid confusion with the original order. The superseded order can be removed from the LEIN system using SCAO Form MC 239.*

*If the only amendment the court wishes to make is to extend the bond's expiration date, Form MC 240a may be used.

Whenever the court modifies its order to impose an additional release condition after the surety has signed the bond, the surety's consent to that condition must be obtained before forfeiture based on its violation is permitted. See *Kondzer v Wayne County Sheriff*, 219 Mich App 632 (1996), discussed at Section 4.12.

4.10 Enforcement Proceedings After Warrantless Arrest for an Alleged Violation of a Release Condition

A release order with conditions for the protection of a named person will only be effective if the defendant knows that violation of the order will result in sanctions. Lax enforcement of such orders may actually increase danger by providing the protected person with a false sense of security. Accordingly, strict, swift enforcement procedures are important tools to promote safety.

If the court has imposed release conditions for the protection of a named person under MCL 765.6b(1); MSA 28.893(2)(1), a peace officer may arrest the defendant without a warrant upon reasonable cause to believe that the defendant is violating or has violated a release condition. MCL 764.15e; MSA 28.874(5). The warrantless arrest authority conferred in these statutes offers swift, significant protection to the person protected by the release order; MCR 6.106 contains no similar provision for warrantless arrest. **Therefore, in cases**

involving allegations of domestic violence, it is safer to issue pretrial release orders under MCL 765.6b; MSA 28.893(2) using SCAO Form MC 240. The following discussion outlines the bond revocation proceedings that follow a warrantless arrest for the alleged violation of a release condition pursuant to MCL 764.15e; MSA 28.874(5).

> **Note:** MCL 764.9c(3)(c); MSA 28.868(3)(3)(c) prohibits the issuance of an appearance ticket for a misdemeanor or ordinance violation to a person who is subject to a condition of bond or other condition of release, until the person meets the requirements of bond or other conditions of release.

A. Preparation of Complaint

After warrantless arrest for violation of a release condition pursuant to MCL 764.15e; MSA 28.874(5), bond revocation proceedings are initiated by a complaint. The arresting officer must prepare the complaint in a format that substantially corresponds to the format contained at MCL 764.15e(2)(a); MSA 28.874(5)(2)(a). Proceedings after preparation of the complaint depend on whether or not the defendant was arrested within the judicial district of the court that issued the order for conditional release.

- If the arrest occurred **within the judicial district** of the court that issued the order for conditional release, the defendant must appear before the issuing court within one business day after the arrest to answer the charge of violating the release conditions. MCL 764.15e(2)(b)(ii); MSA 28.874(5)(2)(b)(ii). Under MCL 764.15e(2)(b)(i); MSA 28.874(5)(2)(b)(i), the arresting officer must immediately provide copies of the complaint as follows:
  - One copy to the defendant;
  - The original and one copy to the issuing court;
  - One copy to the prosecuting attorney for the case; and
  - One copy for the arresting agency.
- If the arrest occurred **outside the judicial district** of the court that issued the order for conditional release, the defendant shall be brought before the district or municipal court in the judicial district in which the violation occurred within one business day following the arrest. That court shall determine conditions of release and promptly transfer the case to the court that issued the conditional release order. The court to which the case is transferred shall notify the prosecuting attorney in writing of the alleged violation. MCL 764.15e(2)(c)(ii); MSA 28.874(5)(2)(e)(c)(ii). Under MCL 764.15e(2)(c)(i); MSA 28.874(5)(2)(c)(i), the arresting officer must immediately provide copies of the complaint as follows:
  - One copy to the defendant;
  - The original and one copy to the district court in the judicial district in which the violation occurred; and,
  - One copy for the arresting agency.

B. Availability of Interim Bond

If the arresting agency or officer in charge of the jail determines that it is safe to release the defendant before he or she is brought before the court, the defendant may be released on interim bond of not more than $500 requiring that the defendant appear at the opening of court the next business day. If the defendant is held for more than 24 hours without being brought before the court, the officer in charge of the jail must note in the jail records the reason it was not safe to release the defendant on interim bond. MCL 764.15e(3); MSA 28.874(5)(3).

> **Note:** The interim bond statutes (MCL 780.581; MSA 28.872(1) - MCL 780.588; MSA 28.872(8)) do not apply to certain domestic violence offenses. If the conditional release violation also constitutes one of these offenses, the defendant should not be released on interim bond. See Section 4.3 for discussion of restrictions on interim bond.

C. Hearing Procedures

If a defendant has been arrested without a warrant for alleged violation of release conditions imposed under MCL 765.6b(1); MSA 28.893(2)(1), the warrantless arrest statute requires the court to give priority to cases in which the defendant is in custody, or in which the defendant's release would present an unusual risk to the safety of any person. MCL 764.15e(4); MSA 28.874(5)(4). The warrantless arrest statute further provides that "[t]he hearing and revocation procedures for cases brought under this section shall be governed by supreme court rules." MCL 764.15e(5); MSA 28.874(5)(5).

MCR 6.106 does not give clear guidance on hearing procedures after a warrantless arrest for alleged violation of a pretrial release condition. This court rule states that the court may issue a warrant for the defendant's arrest if he or she has violated a release condition,* and contains no requirement for a hearing whatsoever. MCR 6.106(I)(2) provides:

*MCR 6.106 was adopted prior to the 1993 passage of the warrantless arrest provisions in MCL 764.15e; MSA 28.874(5).

> "(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> "(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bond has been ordered, to anyone who posted bond."

Although MCR 6.106(I)(2) is silent on the issue of a revocation hearing, the statutes governing bail for traffic or misdemeanor offenses require the court to hold a hearing in cases where the defendant has been arrested on a warrant issued after a breach or threatened breach of any release conditions:

> "Upon verified application by the state or local unit of government stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court *for a hearing* on the

> matters set forth in the application. At the conclusion of the hearing the court may enter an order [increasing or reducing the amount of bail or altering the conditions of the bail bond]." MCL 780.65(4); MSA 28.872(55)(4). [Emphasis added.]

The federal due process requirements for revoking bond were addressed in *Atkins v People*, 488 F Supp 402 (ED Mich, 1980), aff'd in pertinent part 644 F2d 543 (CA 6, 1981), a habeas corpus proceeding arising from the petitioner's prosecution for murder in Detroit Recorder's Court. The petitioner in *Atkins* asserted that the Michigan Court of Appeals violated his due process rights when it summarily cancelled his bond set by the Recorder's Court without reviewing the transcript of proceedings in the Recorder's Court or providing any reasons for its action. The federal courts agreed, holding that the defendant's liberty interest pending trial on criminal charges was "sufficiently urgent that as a matter of due process [bail] cannot be denied without the application of a reasonably clear legal standard and the statement of a rational basis for the denial." 644 F2d at 549. The Sixth Circuit Court of Appeals further noted that the Michigan Court of Appeals' action rendered meaningful review impossible, and violated "basic norms of judicial decisionmaking." It held that "if [defendant's] liberty is to be denied, it must be done pursuant to an adjudicatory procedure that does not violate the standards for due process established by the fourteenth amendment." 644 F2d at 550. For a similar holding in a case involving the cancellation of bond for a post-conviction detainee pending appeal of the conviction, see *Puertas v Department of Corrections,* 88 F Supp 2d 775 (ED Mich, 2000).

In light of the protected liberty interests articulated in *Atkins*, and the hearing requirement set forth in MCL 780.65(4); MSA 28.872(55)(4), the Advisory Committee for this chapter of the benchbook suggests that basic due process requires the court to give defendants an opportunity for a hearing after warrantless arrest for alleged violation of a release condition imposed under MCL 765.6b; MSA 28.893(2). The Committee further suggests hearing procedures analogous to those described for bail custody hearings in MCR 6.106(G). Under this court rule, the court may conduct custody hearings at the defendant's request, as follows:

> "(2)(a) At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses.
>
> "(b) The rules of evidence, except those pertaining to privilege, are not applicable....A verbatim record of the hearing must be made."

Appellate review of the court's decision revoking bond is governed by MCR 6.106(H)(1):

> "A party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision. There is no fee for filing the motion. The reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion."

In addition to revocation procedures under the court rule, MCL 765.6b(1); MSA 28.893(2)(1) anticipates that contempt proceedings may be brought against the defendant.* This statute requires the court to inform defendants on the record of the following sanctions at the time the court issues a conditional release order:

*For a discussion of contempt proceedings generally, see Sections 8.3-8.4.

> "[I]f the defendant violates a condition of release, he or she...may have his or her bail forfeited or revoked and new conditions of release imposed, *in addition to any other penalties that may be imposed if the defendant is found in contempt of court*." [Emphasis added.]

The U.S. Supreme Court has held that double jeopardy protections attach to non-summary criminal contempt proceedings. In *United States v Dixon*, 509 US 688 (1993), a defendant accused of second degree murder was granted pretrial release on the condition that he not commit any criminal offense. After his release, the defendant was arrested and indicted for possession of narcotics. Based on the alleged narcotics offense, the court in the murder proceeding found the defendant guilty of criminal contempt for the violation of his release conditions. The defendant then moved to have the narcotics indictment dismissed on double jeopardy grounds. A majority of the U.S. Supreme Court agreed that double jeopardy barred the defendant's prosecution for possession of narcotics. For more discussion of both the ***Dixon*** case and Michigan law on double jeopardy, see Section 8.12.

4.11 Enforcement Proceedings Where the Defendant Has Not Been Arrested for the Alleged Violation

If the defendant violates a release condition imposed under MCL 765.6b; MSA 28.893(2) and is not arrested under the warrantless arrest statute,* MCR 6.106(I)(2) provides as follows:

*The warrantless arrest statute is MCL 764.15e; MSA 28.874(5).

> "(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> "(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bond has been ordered, to anyone who posted bond."

Practice under the court rule varies as to whether the bond revocation proceedings are initiated on motion of the prosecutor, or on the court's own motion. In misdemeanor cases, MCL 780.65(4); MSA 28.872(55)(4) provides:

> "*Upon verified application by the state or local unit of government* stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing

> the court may enter an order [increasing or reducing the amount of bail or altering the conditions of the bail bond]." [Emphasis added.]

*See also Section 4.9(A).

This statute makes no provision for court-initiated revocation proceedings in misdemeanor cases. In felony cases, however, MCR 6.106(H)(2) authorizes modification of prior release decisions on the motion of a party to the proceedings, or on the court's own initiative.* In any event, if the court initiates revocation proceedings on its own motion, the Advisory Committee for this chapter of the benchbook suggests that it notify all interested parties, and set the matter for hearing if it is contested.

MCR 6.106(I)(2) is silent as to the hearing requirements after a defendant's arrest pursuant to a warrant for an alleged violation of a release condition. A hearing is required in misdemeanor cases under MCL 780.65(4); MSA 28.872(55)(4); however, this statute does not set forth specific hearing procedures. In light of the liberty interests at stake, the Advisory Committee suggests that courts follow procedures analogous to those described for bail custody hearings in MCR 6.106(G). Under this court rule, the court may conduct custody hearings at the defendant's request. Such hearings must follow the following procedures:

> "(2)(a) At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses.
>
> "(b) The rules of evidence, except those pertaining to privilege, are not applicable....A verbatim record of the hearing must be made."

See *Atkins v People,* 488 F Supp 402 (ED Mich, 1980), aff'd in pertinent part 644 F2d 543 (CA 6, 1981), for a discussion of the federal due process requirements for revoking bond. This case is discussed in Section 4.10(C).

Appellate review of the court's decision revoking bond is governed by MCR 6.106(H)(1):

> "(1)A party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision. There is no fee for filing the motion. The reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion."

*For a discussion of contempt proceedings generally, see Sections 8.3-8.4.

In addition to revocation procedures under the court rule, MCL 765.6b(1); MSA 28.893(2)(1) anticipates that contempt proceedings may be brought against the defendant.* This statute requires the court to inform defendants of the following sanctions at the time the court issues a conditional release order:

> "[I]f the defendant violates a condition of release, he or she... may have his or her bail forfeited or revoked and new conditions of release imposed, *in addition to any other penalties that may be imposed if the defendant is found in contempt of court*." [Emphasis added.]

The U.S. Supreme Court has held that double jeopardy protections attach to non-summary criminal contempt proceedings. See *United States v Dixon*, 509 US 688 (1993), discussed at Sections 4.10(C) and 8.12.

4.12 Forfeiture of Bond Where Defendant Violates a Release Condition

MCR 6.106(I)(2) contains the procedural requirements for bond forfeiture:

- If the court revokes its release order and declares the surety bond forfeited, it must mail notice of the revocation order immediately to the defendant at his or her last known address, and to anyone who posted bond. MCR 6.106(I)(2)(a).
- "If the defendant does not appear and surrender to the court within 28 days after the revocation date or does not within the period satisfy the court that there was compliance with the conditions of release or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone who posted bond for the entire amount of the bond and costs of the court proceedings." MCR 6.106(I)(2)(b).

Forfeiture of a bond in the event the defendant violates a condition of release imposed under MCL 765.6b(1); MSA 28.893(2) is permitted only if the surety has notice of the condition and given consent to it. In *Kondzer v Wayne County Sheriff,* 219 Mich App 632 (1996), the surety obtained a $50,000 bail bond for the pretrial release of a criminal defendant, who was charged with criminal sexual conduct. When the district court bound the defendant over to circuit court for trial, it added a condition to release that defendant have no contact with the complaining witness. The surety was not present when the court added the additional condition, and did not consent to it. Thereafter, the defendant raped the complaining witness, in violation of the protective condition. The Court of Appeals held that forfeiture of the bond was improper in this case, because the surety did not consent to the additional protective condition on defendant's release. A surety bond is a contract governed by the common law rule that the parties' liabilities under a contract are strictly limited by its terms, which cannot be changed without the parties' consent. This common law rule was not changed by MCL 765.6b(1); MSA 28.893(2)(1).

4.13 Denying Bond

The court may only deny bond to defendants charged with certain serious crimes, "when the proof is evident or the presumption great." Const 1963, art 1, §15. Since some domestic violence crimes may involve the type of serious conduct for which bail may be denied, this section discusses the circumstances under which a court may deny bond.

A court may deny pretrial release to a defendant charged with murder if it finds that proof of guilt is evident or the presumption great. MCR 6.106(B)(1)(a)(i) (which incorporates the constitutional bail provisions).

A court may also deny pretrial release to a defendant charged with a violent felony* if it finds that proof of guilt is evident or the presumption great, and:

> "[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or
>
> "[B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents." MCR 6.106(B)(1)(a)(ii).

*A violent felony contains an element involving a violent act or threat of a violent act against any other person. MCR 6.106(B)(2).

If a court finds that proof of guilt is evident or the presumption great, it may deny pretrial release under MCR 6.106(B)(1)(b) to a defendant charged with the following listed offenses, unless it finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person:

- First degree criminal sexual conduct;
- Armed robbery; or,
- Kidnapping with the intent to extort money or other valuable thing thereby.

No hearing is required to deny bond under MCR 6.106(B) unless the defendant is held in custody and requests a hearing. MCR 6.106(G)(1). If a hearing is held, MCR 6.106(G)(2) requires the following procedural safeguards:

- The defendant is entitled to be present and to be represented by a lawyer;
- The defendant and prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses;
- The rules of evidence are not applicable, except those pertaining to privilege; and,
- A verbatim record of the hearing must be made.

If a court denies pretrial release, it must state its reasons on the record, using SCAO Form MC 240. The completed form must be placed in the court file. MCR 6.106(B)(4).

Upon denial of pretrial release, defendant may be held in custody for a maximum of 90 days after the date of the court's order, excluding delays attributable to the defense. If trial does not begin within the 90-day period, the court must immediately schedule a hearing and set the amount of bail. MCR 6.106(B)(3).

4.14 Sentencing Domestic Violence Offenders

A. Identifying and Assessing Domestic Violence Offenses

When sentencing an individual convicted of a crime against an intimate partner, it is important to remember that "domestic violence" is more than assault and battery. Domestic violence involves a variety of tactics, so that any crime can be a "domestic violence crime" if it occurs within a pattern of behavior designed to exert power and control over an intimate partner. Moreover, "domestic violence crimes" are not limited to crimes directed against the person of the offender's intimate partner. Abusers may attempt to exercise control by using behavior directed against their partners' property, animals, family members, or associates. For a discussion of the nature of domestic abuse and its various forms, see Sections 1.2 and 1.5. For a discussion of crimes that can be associated with domestic violence, see Chapter 3.

Once a court has identified a crime as a "domestic violence crime," it is critical to assess the lethality of the situation. A list of lethality factors appears at Section 1.4(B). The National Council of Juvenile and Family Court Judges recommends that courts have information about the following subjects at the time of sentencing for a domestic violence crime:*

*Herrell & Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile & Family Court Journal 15-16 (1990).

- The facts of the case.
- The offender's criminal history.
- The offender's prior abusive behavior.
- The offender's drug or alcohol use.
- The offender's mental health.
- Prior and pending court contacts with the offender and his or her family, particularly domestic relations and personal protection actions.
- Children living in the home of the victim or offender.
- The impact of the violence on the victim and the victim's desires as to the disposition. On a victim's right to make an impact statement at sentencing, see the Crime Victims' Rights Act, MCL 780.764-780.765; MSA 28.1287(764)-(765) (felony cases), MCL 780.824-780.825; MSA 28.1287(824)-(825) (misdemeanor cases), and MCL 780.792-780.793; MSA 28.1287(792)-(793) (juvenile offenses).*

*Detailed discussion of these provisions appears in Miller, Crime Victim Rights Manual, ch 9 (MJI, 2001).

To reduce the risk of repeat offenses against the victim, sentence should be imposed as soon as possible after conviction of a domestic violence crime. The most effective sentences motivate change by holding the offender accountable and conveying the message that the community will not tolerate domestic abuse.

B. Choosing a Sentencing Option — Conditions of Probation

*See Section 1.7 on the effects of domestic violence on children. For recommendations on sentencing, see Herrell & Hofford, *supra*, at 16, 32.

The existence of an intimate relationship between the victim of a crime and its perpetrator does not diminish the seriousness of the crime. On the contrary, the close relationship between the victim and perpetrator of a domestic violence crime may enhance the perpetrator's access to the victim and the potential for re-victimization. Moreover, when the devastating effects on children are considered, domestic violence crimes pose a far greater potential for harm to society in the long term. Accordingly, it is important for purposes of sentencing that domestic violence crimes be treated no less seriously than similar crimes involving strangers. Furthermore, it is critical that the court impose sentence with the victim's safety in mind.*

Incarceration, fines, restitution, and probationary sentences are all tools for courts to use in holding domestic violence perpetrators accountable for their behavior. Incarceration and fines for specific domestic violence crimes are discussed in other sections of this benchbook, as follows:

- Section 3.2 — Penalties for domestic assault under MCL 750.81; MSA 28.276.
- Section 3.3 — Penalties for domestic assault and infliction of serious injury under MCL 750.81a; MSA 28.276(1).
- Sections 3.6(A) — Deferral of proceedings for first-time offenders under the domestic assault statutes.
- Section 3.8(C) — Penalties for misdemeanor stalking under MCL 750.411h; MSA 28.643(8).
- Section 3.9(B) — Penalties for felony aggravated stalking under MCL 750.411i; MSA 28.643(9).
- Section 3.10 — Penalties for stalking by way of an electronic medium of communication under MCL 750.411s; MSA 28.643(10s).
- Section 3.5(A) — Penalties for parental kidnapping under MCL 750.350a; MSA 28.582(1).
- Sections 3.6(B) — Deferral of proceedings for first-time offenders in parental kidnapping cases.
- Section 8.9 — Contempt sanctions for violation of a personal protection order.

In ordering restitution, courts are to compensate crime victims or their estates for harm suffered as a result of the defendant's conduct. Additionally, courts are to order restitution to any persons or entities that have compensated the victim or provided the victim with services such as shelter, food, clothing, and transportation. See MCL 769.1a; MSA 28.1073 and the Crime Victim's Rights Act, MCL 780.766; MSA 28.1287(766) (felony cases), MCL 780.794; MSA 28.1287(794) (juvenile offenses), and MCL 780.826; MSA 28.1287(826) (misdemeanor cases). For a general discussion of restitution, see Miller, Crime Victim Rights Manual, ch 10 (MJI, 2001).

In imposing probationary sentences, courts have great discretion as to the conditions of probation. Probation orders must prohibit the probationer from violating any criminal law of any U.S. jurisdiction, and from leaving Michigan without court consent. MCL 771.3(1); MSA 28.1133(1). Additionally, MCL 771.3(2); MSA 28.1133(2) lists specific requirements that a court may impose upon a probationer, including: imprisonment in the county jail; payment of costs, fines, or restitution; community service; and, participation in "mental health treatment" or "mental health or substance abuse counseling."* MCL 771.3(4); MSA 28.1133(4) provides generally that the court may impose "other lawful conditions of probation as the circumstances of the case require or warrant, or as in its judgment are proper." For a case stating that a court may impose payment of child support as a probation condition, see *People v Robin Ford*, 95 Mich App 608, 612 (1980), overruled on other grounds 410 Mich 902 (probation shall not be revoked for failure to pay child support or court costs absent appropriate findings on defendant's claim of indigency).

*See also MCL 750.411h(3); MSA 28.643(8)(3) and MCL 750.411i(4); MSA 28.643(9)(4), which permit the court to order psychiatric, psychological, or social counseling as a condition of probation for stalking offenders.

In crafting probation orders for cases involving domestic violence, a court can promote safety by considering the same factors and incorporating many of the same types of provisions that are relevant for pretrial release conditions. See Sections 4.5 and 4.6 in this regard. In particular, "no-contact" provisions may be necessary to promote the safety of a domestic violence victim; MCL 771.3(2)(o); MSA 28.1133(2)(o) authorizes the issuance of probation orders with "conditions reasonably necessary for the protection of 1 or more named persons." Probation orders containing such conditions are entered into the LEIN system to facilitate warrantless arrest in case of a violation. MCL 771.3(5); MSA 28.1133(5) (on LEIN entry), MCL 764.15(1)(g); MSA 28.874(1)(g) (on warrantless arrest).

> **Note:** Probation orders with conditions for protection of a named individual are entitled to full faith and credit in other U.S. jurisdictions under the federal Violence Against Women Act. 18 USC 2265 - 2266. See Section 8.13 for further discussion. See also MCL 791.236(14); MSA 28.2306(14), providing for parole orders with conditions to protect a named individual. These are entered into the Corrections Management Information System, which is accessible by the LEIN system. *Id.*

C. Batterer Intervention Services as a Condition of Probation

In misdemeanor cases involving domestic violence, many courts order defendants to complete programs offered by "batterer intervention services" as a condition of probation. To promote victim safety and offender accountability in such cases, the State Court Administrative Office has encouraged Michigan courts to follow guidelines on batterer intervention standards that were promulgated by a statewide task force and endorsed by Governor John Engler in 1999, and by the 2001 Governor's Domestic Violence Homicide Prevention Task Force. See SCAO Administrative Policy Memorandum 1999-01 and *Report and Recommendations,* Domestic Violence Homicide Prevention Task Force, p 12, 18 (April, 2001). For a

detailed discussion of the Michigan Batterer Intervention Standards, see Sections 2.3-2.4.

In making use of batterer intervention service programs, courts should be aware of the potential for both positive and negative outcomes. Although a batterer intervention program provides the opportunity for change, it may also give the court and the abused individual a false sense of security. Courts and abused individuals should be aware that batterer intervention services cannot guarantee that participants will change their behavior. Indeed, some research questions the efficacy of batterer intervention programs in stopping abuse.* Accordingly, both the court and the abused individual must be careful to do an ongoing assessment of an abuser's potential for lethality, as noted in Section 1.4(B). Especially in cases with a high risk for lethal violence, batterer intervention services alone will not be sufficient to protect victims. Batterer intervention services should never be substituted for other conditions of probation imposed to protect the victim, such as jail sentences, "no-contact" orders, tethers, or frequent reports to a probation officer.

*See *Health Watch,* 6 Domestic Violence Report 37 (Feb/ March 2001).

Batterer intervention services are also limited as a sentencing option in that they have no punitive function. Although they stress abuser accountability, the purpose of a batterer intervention service is to provide an opportunity for behavioral and attitudinal change, not to punish. To convey the message that domestic violence crimes are just as serious as other types of crimes, it may be necessary for the court to order punitive sanctions (such as jail time or fines) in addition to participation in batterer intervention services. Where a court orders batterer intervention as a condition of probation without accompanying punitive sanctions, it runs the risk of communicating to the offender that domestic abuse is not truly "criminal."

A further limitation on batterer intervention is that is serves no restorative purpose. Participation in a batterer intervention service should not be substituted for restitution to the victim or the community in the form of compensatory payments or community service.

Despite the foregoing limitations, some judges have found that batterer intervention services can teach some individuals non-abusive ways of relating to their partners. Other judges are skeptical of the efficacy of batterer intervention (or of their responsibility to 'cure' the offender), but nonetheless believe that it can serve a useful purpose by reinforcing the court sanctions.*

*Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice, & Enforcement,* p 44 (Nat'l Inst of Justice, 1990).

> **Note:** If the court orders participation in a batterer intervention service as a condition of probation, the Advisory Committee for this chapter of the benchbook suggests that the probation period be for two years, with the possibility of early discharge if the offender satisfactorily completes the batterer intervention service or other conditions of probation. If the sentence requires *satisfactory* completion of the batterer intervention service (rather than mere attendance), probation can be revoked for reasons other than non-attendance. Satisfactory completion would require such things as attendance, payment of fees, participation in group discussions, and compliance with rules. Probationary sentences of less than a year's duration do not create an opportunity to adequately hold

abusers accountable, particularly when they do not require the offender to report regularly to a probation officer.

4.15 Monitoring Compliance with Conditions of Probation

To hold a domestic violence offender accountable and to promote victim safety, the offender must be adequately monitored. This section contains suggestions for obtaining information about compliance with the conditions of probation, and for effective enforcement of orders for probation.

A. Obtaining Information

The court can promote safety in cases involving domestic violence if its probationary sentences require that the offender report frequently and in person to his or her probation officer.* Frequent, in-person reporting can also promote accountability and provide incentive for change by regularly reminding the offender that his or her behavior is not acceptable. Some Michigan counties have instituted intensive supervision programs for domestic violence offenders. These offenders are assigned to a single probation officer. They are required to report to the probation officer at least once a week, and to submit to drug and/or alcohol testing and unscheduled home visits.

*MCL 771.3(1)(c); MSA 28.1133(1)(c) requires that probationers report to probation officers "either in person or in writing, monthly or as often as the probation officer requires."

If the court orders an offender to participate in a batterer intervention service program, it is important that the service provider make regular (e.g., monthly) reports to the court or probation officer about the offender's compliance with this condition of probation. The Michigan Batterer Intervention Standards contain provisions for service providers to make progress reports to the referring court about program participants. See Section 2.4(C)-(D) for guidelines under the Statewide Standards on participant confidentiality and communicating with the referring court.

Information about an offender's compliance with conditions of probation can also be obtained from the victim of the crime. The National Council of Juvenile and Family Court Judges recommends that probation officers maintain periodic, private contact with the victim for this purpose. In doing so, however, the officer should remember that monitoring compliance is the state's responsibility, and be careful not to place the victim in the potentially dangerous position of monitoring and reporting on the offender.* Officers should also be mindful of the confidential relationship that exists between a probation officer and a probationer or defendant under investigation. See MCL 791.229; MSA 28.2299, providing that "[a]ll records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection." Discussion of the scope of this privilege appears at *Howe v Detroit Free Pres*s, 440 Mich 203 (1992).

*Herrell & Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile & Family Court Journal 33-34 (1990). See also Section 2.4(E) for guidance under the Michigan Batterer Intervention Standards.

Finally, it is essential in monitoring compliance with conditions of probation to remember that concurrent personal protection or domestic relations actions involving probationers and their intimate partner may be pending in other courts. Probation officers can promote victim safety and abuser accountability by making regular inquiry into the existence and status of these other proceedings.

B. Enforcing Probation Violations

*The victim may also get a PPO. See Chapters 6 - 8 on PPOs.

The police have warrantless arrest authority to enforce violations of probation orders. MCL 764.15(1)(g); MSA 28.874(1)(g). Probation orders with conditions for the protection of a named individual under MCL 771.3(2)(o); MSA 28.1133(2)(o) are entered into the LEIN system. MCL 771.3(5); MSA 28.1133(5). To further promote safety, some courts give the victim a copy of the probation order to show to police officers in the event of a violation.*

To reduce the risk of further crimes against the victim, a domestic violence offender should face clear, certain, consistent, quick consequences for any violation of conditions of probation. Jail time is only one of many consequences the court can impose. In some cases, it may be appropriate and effective to impose alternative sanctions such as more stringent supervision conditions, community service, tethers, or work crew service. The imposition of incremental sanctions for noncompliance may be appropriate for directing offenders away from ingrained, learned patterns of behavior. Herrell & Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile and Family Court Journal 34 (1990).

The mechanics of probation revocation proceedings are beyond the scope of this benchbook. For more information, see MJI's Criminal Benchbook Series, Monograph 7, *Probation Revocation* (MJI, 1992).

4.16 Victim Confidentiality Concerns and Court Records

Court records and confidential files are not subject to requests under Michigan's Freedom of Information Act ("FOIA"), as the judicial branch of government is specifically exempted from that act. MCL 15.232(d)(v); MSA 4.1801(2)(d)(v). However, court records are public unless specifically restricted by law or court order. MCR 8.119(E)(1). This section examines specific restrictions on access to criminal court records that will help to preserve the confidentiality of crime victims' identities.

> **Note:** See Sections 10.4-10.5 and 11.4 on confidentiality of records in domestic relations actions, and Section 7.4(C) on confidentiality issues in personal protection actions. On safety and privacy for crime victims generally, see Miller, Crime Victim Rights Manual, ch 4-5 (MJI, 2001).

A. Felony Cases

The Crime Victim Rights Act, MCL 780.758(2); MSA 28.1287(758)(2), limits access to the victim's address and phone number in felony cases:

> "The work address and address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim shall not be in the court file or ordinary court documents except as contained in a transcript of the trial."*

*The misdemeanor and juvenile articles of the Crime Victim Rights Act do not contain this provision.

On motion by the prosecutor, victim identifying information may also be protected from disclosure during testimony at trial or pretrial proceedings, based on the victim's reasonable apprehension of acts or threats of physical violence or intimidation. See MCL 780.758(1); MSA 28.1287(758)(1), governing felony proceedings. Similar protections are available in misdemeanor and delinquency cases under MCL 780.818(1); MSA 28.1287(818)(1) (misdemeanor cases) and MCL 780.788(1); MSA 28.1287(788)(1) (delinquency cases).

B. Juvenile Delinquency Cases

Under MCL 712A.28(2); MSA 27.3178(598.28)(2), and MCR 5.925(D)(1), the general rule is that all *records* of the "juvenile court" are open to the general public, while *confidential files* are not open to the public. MCR 5.903(A)(9) defines "records" as the pleadings, motions, authorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, and court orders. MCR 5.903(A)(18) defines "confidential files" as all materials made confidential by statute or court rule, including:

- The separate statement by an investigating agency about known victims of juvenile offenses as required by MCL 780.784; MSA 28.1287(784);
- The testimony taken during a closed proceeding pursuant to MCR 5.925(A)(2) and MCL 712A.17(7); MSA 27.3178(598.17)(7); and,
- Court materials or records that the court has determined to be confidential.

MCR 5.925(D)(2) states that confidential files shall only be made accessible to persons found by the court to have a legitimate interest. In determining whether a person has a legitimate interest, the court must consider:

- The nature of the proceedings;
- The welfare and safety of the public; and,
- The interests of the juvenile.

The Crime Victim Rights Act, MCL 780.788(1); MSA 28.1287(788)(1), provides that on motion by the prosecutor or victim, victim identifying

information may be protected from disclosure during testimony at any court hearing in delinquency cases, based on the victim's reasonable apprehension of acts or threats of physical violence or intimidation.

C. Misdemeanor Cases

The Crime Victim Rights Act, MCL 780.816(1); MSA 28.1287(816)(1), provides that the post-arraignment notice from the court to the prosecuting attorney containing the victim's name, address, and telephone number is not a public record.

At MCL 780.830; MSA 28.1287(830), the Crime Victim Rights Act further provides that a victim's address and telephone number maintained by a court or a sheriff for any purpose under Article 3 (the misdemeanor article) of the Act are exempt from disclosure under Michigan's Freedom of Information Act.

On motion by the prosecutor, victim identifying information may be protected from disclosure during testimony at trial or pretrial proceedings, based on the victim's reasonable apprehension of acts or threats of physical violence or intimidation. MCL 780.818(1); MSA 28.1287(818)(1).

D. Name Changes

MCL 711.3(1); MSA 27.3178(563)(1) provides that in a name change proceeding under MCL 711.1; MSA 27.3178(561), the court may order for "good cause" that no publication of the proceeding take place and that the record of the proceeding be confidential. "Good cause" includes (without limitation) evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger, such as evidence that the petitioner or another individual has been the victim of stalking or an assaultive crime.

Evidence of the possibility of physical danger must include the petitioner's or endangered person's sworn statement of the reason for the fear of physical danger if the record is published or otherwise available. If evidence is offered of stalking or and assaultive crime, the court shall not require proof of arrest or prosecution for that crime to reach a finding of "good cause." MCL 711.3(2); MSA 27.3178(563)(2).

The statute imposes misdemeanor penalties on court officers, employees, or agents who divulge, use, or publish, beyond the scope of their duties with the court, information from records made confidential under the foregoing provisions. However, no sanctions apply to disclosures made under a court order. MCL 711.3(3); MSA 27.3178(563)(3).

Confidential records created under this statute are exempt from disclosure under the Freedom of Information Act. MCL 711.3(4); MSA 27.3178(563)(4).